

February 29, 2008

Mr. Bruce Wolfe  
Executive Officer  
San Francisco Bay Regional Water Quality Control Board  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

**Subject: City of San José Legal Comments on the Tentative Order for the  
Municipal Regional Stormwater National Pollutant Discharge  
Elimination System Permit**

Dear Mr. Wolfe:

We are submitting these comments on behalf of the City of San José to identify and summarize the legal objections that San José has to the Provisions in the above Tentative Order that are identified and discussed in the technical comments on the Tentative Order that have been submitted on behalf of the City San José by John Stuffelbean, San José Director of Environmental Services.

As indicated in San José's technical comments, San José generally objects to the inclusion in the Tentative Order of:

- overly prescriptive requirements, which do not allow for any flexibility (adaptive management) to focus local resources on local water quality concerns;
- stringent and costly new and expanded program requirements that lack sufficient evidence of water quality benefit; and
- unnecessary requirements for costly and prescriptive water quality monitoring.

Overly prescriptive requirements in wastewater discharge permits are prohibited under Water Code §13360. The overly prescriptive nature of the Tentative Order combined with its broad application to a wide range of public agency permittees, also raises a concern that the Regional Board is in effect, adopting an underground rule, in violation of the Administrative Procedures Act, rather than the "general waste discharge requirements for a

category of discharges" that is contemplated by Water Code §13263. Permit requirements that are not adequately linked to improvements in water quality violate Water Code §§13241 and 13263. Requirements that go beyond those required under the federal Clean Water Act, require consideration of economic impacts, and without the assurance of the provision of State funding, violate Article XIII B, Section 6 of the California Constitution. With respect to the State Mandate issue, we incorporate by reference herein, the legal comments on that issue of the attorneys for the Santa Clara Valley Urban Runoff Program (SCVURPP) and the Alameda County Clean Water Program (ACCWP).

Although the above legal deficiencies run throughout the Tentative Order, this letter focuses on San José's specific concerns with the Tentative Order, as identified in the technical comments, and the legal objections associated with these concerns.

**Municipal Maintenance [Provision C.2]**

The requirement to conduct annual storm drain inspection and cleaning on all inlets prior to the rainy season is overly prescriptive, not sufficiently linked to providing a water quality benefit, and is a mandate that is not required by the federal Clean Water Act. As noted in the technical comments, San José's current strategy of inspecting and cleaning as needed each inlet once annually, typically between September and February, is more likely to prevent blockage in the storm sewer system than the proposal to conduct this work only during the dry season. There is inadequate evidence of water quality benefit to justify the significant cost (\$650,000 per year for San José) associated with this requirement and no assurance that State funding will be provided.

**New Development and Redevelopment [Provision C.3]**

The requirement that treatment measures be implemented for trail and road rehabilitation projects and the elimination of the alternative compliance option for transit-oriented projects are also overly prescriptive, not sufficiently linked to providing a water quality benefit, and are mandates that are not required by the federal Clean Water Act. The treatment measure requirement for trail projects is especially costly (\$60M for San José's current trail program) and could have negative impacts on water quality if lack of trails limits public awareness of, and concern for, local creeks. Water quality benefit evidence is completely lacking for requiring treatment measures for road rehabilitation projects. Increasing the cost of these projects, without the assurance of funding for these costs, will simply mean that fewer roads are repaired; and there is no evidence that roads that are left in poor condition are better for water quality than roads that are in good condition. Placing restrictions on the transit-oriented development option for alternative compliance is overly prescriptive and unsupported by evidence of water quality benefit.

**Industrial and Commercial Site Controls [Provision C.4]**

The cost of the requirement for inspection of mobile businesses during their field activities and the shifting of responsibility to San José for regulating facilities that are now regulated by the Regional Board are San José's major areas of concern with this Provision.

San José contends that its current program, which includes inspection of several of these categories at their business address and, at a minimum, provision of outreach materials, is a more effective use of resources than a field-based inspection program for mobile services. A field-based inspection program would cost an additional \$500,000 annually and there is inadequate evidence that it would result in improvement of water quality. Similarly, the shift in responsibility to local agencies for businesses now regulated by the Regional Board is not tied to improving water quality, but simply to shifting the costs of regulation from the state to municipalities. We note and incorporate by reference herein, the ACCWP legal comments concerning the lack of clarity of the new inspection requirements. San José also objects to the requirement to report inspection results at the transaction level. There would be no demonstrable water quality benefit from the increased reporting, and it is inconsistent with the goal of streamlining reporting for permittees, and summary data in annual reports is sufficient to demonstrate program performance.

**Illicit Discharge Detection and Elimination [Provision C.5]**

As with Provision C.4, San José requests that the excessive reporting requirements be removed, due to lack of demonstrable water quality benefit because complete records are available for review upon request and summary data in annual reports is sufficient to demonstrate program performance.

**Construction Site Control [Provision C.6]**

The construction site control provision is a particularly good example of the overly prescriptive nature of the Order and the lack of connection between water quality improvement and Order requirements. San José requests that references to stop work orders and withholding inspections be removed. This requirement is overly prescriptive. Municipalities must have discretion in choosing how to do enforcement. San José also reiterates its concern that excessive reporting is costly and not sufficiently linked to improvement in water quality and requests that deletion of the requirement to report inspection results at the transaction level.

**Public Information and Outreach [Provision C.7]**

The Tentative Order's overly prescriptive approach to outreach and refusal to allow agencies to take full credit for inter-agency collaboration results in unnecessary costs without sufficient evidence of water quality benefit. Without the assurance of State funding to cover this additional cost, the provision must be modified as recommended in San José's technical comments.

**Water Quality Monitoring [Provision C.8]**

The legal deficiencies in this overly prescriptive provision, going well-beyond federal requirements, without any assurance of the provision of state funding, are well-covered in the ACCWP legal comments, which we incorporate by reference herein.

### **Trash Reduction [Provision C.10]**

As indicated in San José's technical comments, implementation of this provision would be extremely costly (San José's estimate is \$11M over a five year permit term), yet there is no assurance of State funding for this additional cost. The provision is also legally deficient due to the lack of evidence on the effectiveness of the very specific controls that are prescribed, the inclusion of duplicative measures, and the failure to allow permittees flexibility to design trash control programs targeted to site-specific conditions.

### **Mercury and PCB Controls [Provision C.11 and Provision C.12]**

San José's specific concerns with these Provisions are the requirements related to abatement on private property and diverting storm flows to the sanitary system. While the cost of implementing these provisions is not known at this time, it is estimated that they could be significant. An overarching legal objection to these provisions is their inconsistency with the PCB TMDL and the Basin Plan. With respect to the diversion of storm flow to the sanitary sewer system, we incorporate by reference BASMAA's comments and the ACCWP legal comments on this issue.

The requirement to initiate abatement efforts on private property also raises legal concerns. Abatement of hazardous substances on private property is primarily a State function. In the absence of State funding for this mandate, and lacking evidence that water quality would be improved by simply shifting this function from State to local authorities, the requirement must be deleted.

### **Copper Controls [Provision C.13]**

This Provision is another example of an overly prescriptive program, not rooted in the protection of water quality. A program to prohibit washwater from copper architectural features is simply not necessary to protect water quality, given what is currently known about the significance of this waste stream as a source of copper to receiving waters.

### **Exempted and Conditionally Exempted Discharges [Provision C.15]**

San José objects to the requirement for a new permitting program for discharges of pumped groundwater, foundation drains, water from crawl spaces, and footing drains. This Provision represents a transfer of regulatory responsibility from the Regional Board to local jurisdictions. The development of an entirely new program, which includes permitting, monitoring, tracking, and reporting of all conditionally-exempt discharges would be costly and there is a lack of evidence the cost for this new program would be commensurate to the threat to water quality. We also note and incorporate by reference the ACCWP legal comments on this issue.

Proposed requirements imposed on planned, unplanned, and emergency discharges of the potable water systems also will have significant operational and cost impacts on San José, are overly prescriptive and in some instances unrealistic. The cost estimate for implementing the proposed requirements for just the San José Municipal Water System

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(SJMWS), which serves only 12% of the City, would be \$379,000 annually, with an additional equipment investment of \$364,000. The Tentative Order provides insufficient information to conclude that current practices present a significant threat to water quality. The proposed requirements are expensive, have questionable water quality benefit, and come with serious health and safety concerns.

#### **CONCLUSION**

On behalf of the City of San José, we request revision of the Tentative Order, as more fully outlined in San José's technical comments and the comments submitted by SCVURPP, to address the legal deficiencies noted above. We also request revision of Discharge Prohibition A.2 and Permit Provision C.1, as requested in both the SCVURPP and ACCWP legal comments, and we concur and incorporate by reference those legal comments with respect to Discharge Prohibition A.2 and Permit Provision C.1.

Sincerely,

**RICHARD DOYLE**

City Attorney

By:



**MOLLIE J. DENT**

Sr. Deputy City Attorney